ORIGINAL

DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
KMC Telecom Inc. Petition For Declaratory Ruling	)	CC Docket No. 99-142
	)	
	)	

REPLY COMMENTS

BellSouth Corporation and BellSouth Telecommunications, Inc. ("BellSouth") hereby submit their Reply Comments in response to the Comments filed on KMC Telecom Inc.'s ("KMC") petition for declaratory ruling.

KMC and its supporters urge the Commission to preempt state regulatory authorities and declare all termination liabilities associated with term plans for intrastate communications services unlawful and void. None of these parties present a factual or legal predicate upon which the Commission could justify such an act that would intrude upon the core intrastate ratemaking powers that the Communications Act reserves for the states.

KMC asserts that all such arrangements foreclose competitive entry. KMC offers no support for its proposition other than anecdotal recitations that termination liabilities exist. The factual deficiency of KMC's petition is not remedied by the comments supporting KMC. No party comes forward with a substantive demonstration that it or any other entity has been foreclosed from entering any telecommunications market or has been precluded from providing any telecommunications service. Instead, KMC and its supporters expect the Commission to act exclusively on their unsubstantiated assertions that competition has suffered.

The relief requested, Commission preemption, can only be granted, if at all, under the provisions of Section 253 of the Communications Act.[1] Section 253, however, is confined to state actions that prohibit entry into the telecommunications market. Neither KMC nor any of its supporters has alleged, let alone demonstrated, that they have actually been denied full entry into the local exchange market. Instead, the Commission is supposed to infer from the mere existence of contract service arrangements that entry is effectively barred. No such inference can be supported by KMC's petition or the comments filed in this proceeding.

Commission action under Section 253 demands a far more substantial factual base than KMC or its supporters have provided. Section 253 carefully circumscribes the Commission's ability to interfere with state regulation of intrastate communications. As the New York Public Service Commission stated:

> The plain language of this section does not empower the Commission to preempt a general category of state legal requirements, nor does it allow the Commission to preempt all states in a single proceeding. Preemption must be narrowly tailored to address the specific state regulation.[2] (emphasis in the original)

Indeed, Section 253 specifically limits the Commission's preemption authority "to the extent necessary to correct" any inconsistency with the provision's requirements.[3] The Commission could not possibly comply with the statute and issue a blanket preemption of all intrastate termination liability provisions as some parties demand.[4] At a minimum, there are markedly different circumstances among the states and the services that require individual consideration by the Commission. These differing circumstances simply cannot be melded

---

1 47 U.S.C. § 253.

2 New York Public Service Commission at 3.

3 47. U.S.C. § 253(d).

4 *See e.g.,* Choice One & Hyperion at 5 and Allegiance at 7-8.

together as KMC and others have tried to do. Contrary to the opinion of several parties including KMC, competition pre-dated the enactment of the Telecommunications Act of 1996. Alternatives to dedicated private line services have long been present beginning with private microwave and VSAT by-pass applications and culminating with transport services provided by facilities-based alternative access providers. Hence, competition for transport services was well established before the Telecommunications Act of 1996. Likewise, the Telecommunications Act of 1996 was not the beginning of competition for exchange services provided over the public switched network. Several states, such as Florida and Tennessee enacted legislation that opened their local exchange markets before the Telecommunications Act of 1996. Moreover, even before these statutory changes, which opened the entire local exchange market, the business segment of the market (one of the primary focuses of the KMC petition) was characterized by a variety of alternatives to LEC provided services.[5]

It is evident that the facts belie claims by some that term contracts were entered into for the purpose of locking out competition.[6] There has been and continues to be active competition for business customers in BellSouth's region. Certainly, with the passage of the Telecommunications Act of 1996, not only has that competition intensified but it has also spread to all segments of the local market. Indeed, it was the presence of competitive alternatives that led state commissions to adopt contract service arrangements as a means by which LECs could respond appropriately to competitive market conditions.

---

[5] For example, shared tenant service providers and PBX vendors competed directly for a LEC's centrex customers.

[6] *See e.g.*, CTSI & RCN at 3, Winstar at 3-4, and MGC at 5-6.

The absence of any evidence that customers lacked competitive alternatives at the time they entered in contract arrangements demonstrates the flimsiness of the claims made by KMC. Simply put, the contract arrangements entered into by BellSouth and other LECs would not have been permitted unless customers had alternatives to LEC services from which to choose.

Recognizing the failure of KMC's petition to meet the minimal requirements for the Commission to act under Section 253, a few parties attempt to suggest additional authority for Commission action. Winstar, relying on the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board,*[7] argues that Section 201(b) authorizes the Commission to determine just and reasonable rates, including intrastate rates and charges.[8] Winstar mistakenly construes the Commission's Section 201(b) authority to prescribe rules to implement specific local competition provisions of the Act with as a general authority to preempt state regulation of intrastate services. The natural consequence of Winstar's interpretation of *AT&T* would be that Section 152(b)'s reservation of regulatory authority over intrastate rates and charges to the states would now be subservient to Commission rulemaking authority. The Supreme Court, however, did not engage in rewriting the Communications Act so as to eliminate the Act's dual state/federal regulatory scheme. All that the Supreme Court found was that the Commission was authorized to implement Sections 251 and 252, the local competition provisions of the Act. Sections 251 and 252 fall within Title II of the Act, and the Court concluded that the Commission's general authority in Section 201(b), to prescribe rules implementing Title II, authorized the Commission to prescribe rules implementing Sections 251 and 252. Section

---

7 *AT&T Corporation, et al. v. Iowa Utilities Board, et al.*, 119 S. Ct. 721 (1999 ("*AT&T*").

8 Winstar at 7-8.

201(b) is not, however, a general grant of authority to the Commission to determine the reasonableness of rates, charges and practices in connection with intrastate communications or an independent authority to preempt state regulation of intrastate services.

ALTS, Net2000 Communications and Teligent ("Joint Parties") argue that the Commission can invalidate termination liabilities found in intrastate contracts and tariffs because, according to these parties, such termination liabilities affect interstate communications.[9] These parties' comments go on at length regarding the Commission's jurisdiction over interstate communications and matters that substantially affect interstate communications. Completely missing from these comments, however, is any demonstration that the intrastate tariffs and contracts at issue in any way affect interstate communications. The absence of such evidence is not particularly surprising because interstate communications are not in the least implicated by the intrastate arrangements. Irrespective of whether a particular customer has an intrastate contract arrangement, the customer remains free to choose his interstate carrier to carry interstate switched and dedicated services. Indeed, the intrastate and interstate components of the communications are clearly distinguishable and severable and, thus, the Joint Parties' alleged basis of Commission jurisdiction does not exist.

The only mechanism available to the Commission to preempt states lies in Section 253. The record in this proceeding, however, unquestionably demonstrates that the requisite factual

---

[9] Joint Parties at 14-17.

predicate necessary to invoke the limited preemption authority granted to the Commission in Section 253 is missing. Accordingly, the Commission must deny KMC's petition.

Respectfully submitted,

BELLSOUTH CORPORATION
BELLSOUTH TELECOMMUNICATIONS, INC.

By: 

M. Robert Sutherland
Richard M. Sbaratta

Their Attorneys

Suite 1700
1155 Peachtree Street, N. E.
Atlanta, Georgia 30306-3610
(404) 249-3386

Date: June 18, 1999

CERTIFICATE OF SERVICE

I do hereby certify that I have this 18th day of June 1999 served the following parties to this action with a copy of the foregoing REPLY COMMENTS by hand delivery or by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties on the attached service list.

Juanita H. Lee

SERVICE LIST CC DOCKET NO. 99-142

Patrick Donovan
Kathleen L. Greenan
KMC Telecom Inc.
Swidler Berlin Shereff Freidman, LLP
300 L Street, NW, Suite 300
Washington, DC 20007

Ted Moniski
Director, Regulatory Affairs
Alaska Communications Systems
600 Telephone Avenue, M.S. #8
Anchorage, AK 99503

Richard Rindler
Allegiance Telecom, Inc.
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N. W., Suite 300
Washington, D. C. 20007

Philip L. Verveer
Gunnar D. Halley
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N. W., Suite 600
Washington, D. C. 20036

Emily M. Williams
Association for Local Telecommunications Svcs.
Suite 900
888 17th Street, N. W.
Washington, D. C. 20006

Jason R. Karp
Christopher T. McKee
NET2000 Communications, Inc.
Suite 500
8180 Greensboro Drive
McLean, VA 22102

David S. Turetsky
Terri B. Natoli
Stuart H. Kupinsky
Michael F. Finn
TELIGENT, Inc.
Suite 400, 8065 Leesburg Pike
Vienna, VA 22182

Kenneth E. Hardman
Columbia Telecommunications, Inc.
D/b/a aXessa
Moir & Hardman
1828 L Street, N. W., Suite 901
Washington, D. C. 20036

Russell M. Blau
CTSI, Inc. and RCN Telecom Services, Inc.
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N. W., Suite 3000
Washington, DC 20007

Dana Frix
Jonanthan Draluck
Choice One Communications and
Hyperion Telecommunications, Inc.
Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW, Suite 300
Washington, DC 20007

Frank J. Miller
Andrew D. Fisher
FairPoint Communications Corp.
Huber Lawrence & Abell
605 Third Avenue
New York, New York 10158

John F. Raposa
GTE Service Corporation
600 Hidden Ridge, HQE03J27
P. O. Box 152092
Irving, TX 75015-2092

Gail L. Polivy
GTE Service Corporation
1850 M Street, N. W.
Washington, DC 20036

Kent F. Heyman
Scott A. Sarem
Richard Heatter
Tracey Buck-Walsh
MGC Communications, Inc.
3301 N. Buffalo Drive
Las Vegas, NV 89129

Jonathan E. Canis
Ross A. Buntrock
MGC Communications, Inc.
Kelley Drye & Warren LLP.
1200 19th Street, N. W.
Fifth Floor
Washington, D. C. 20036

Lawrence G. Malone
Public Service Commission of the
State of New York
Three Empire State Plaza
Albany, New York 12223-1350

Tiki Gaugler
Qwest Communications Corporation
4250 North Fairfax Drive
Arlington, VA 22203

Jay C. Keithley
Sprint Corporation
1850 M Street, N. W.
11th Floor
Washington, DC 20036

Sandra K. Williams
Sprint Corporation
4220 Shawnee Mission Parkway
Suite 303A
Westwood, KS 66205

David R. Conn
McLeodUSA Telecommunications
Services, Inc.
6400 C Street, S. W.
Cedar Rapids, IA 52406-3177

Robert Berger
Russell Merbeth
Winstar Communications, Inc.
1146 19th Street, N .W.
Washington, D.C. 20036

Jonathan E. Canis
Ross A. Buntrock
Michael B. Hazzard
Winstar Communicants, Inc.
Kelley Drye & Warren LLP
1200 Nineteenth Street, N W. Fifth Floor
Washington, D. C. 20036

Larry A. Peck
Ameritech
Room 4H86
2000 West Ameritech Center Drive
Hoffman Estates, IL 60196-1025

Jeffrey A. Brueggeman
Robert B. McKenna
U S West Communications, Inc.
Suite 700
1020 19th Street, N. W.
Washington, D. C. 20036

Robert M. Lynch
Roger K. Toppins
Mark Royer
Southwestern Bell Telephone, Pacific Bell, Nevada Bell & Southern New England Telephone
One Bell Plaza, Room 3024
Dallas, Texas 75202

*Janice M. Myles
Common Carrier Bureau
Federal Communications Commission
425 12th Street, SW
Room 5-C327
Washington, D. C. 20554

*International Transcription Services, Inc.
1231 20th Street, NW
Washington, D. C. 20554

Charles C. Hunter
Catherine M. Hannan
Telecommunications Resellers Association
Hunter Communications Law Group
1620 I Street, N. W., Suite 701
Washington, D.C. 20006

*Magalie Roman Salas, Secretary
Federal Communications Commission
The Portals, 445 Twelfth Street, S. W.
Room TW-A325
Washington, D. C. 20554

* **VIA HAND DELIVERY**